Tun Dato' Sri Ahmad Fairuz bin Dato' Sheikh Abdul Halim v Commisson of Enquiry

COURT OF APPEAL (PUTRAJAYA) — CIVIL APPEAL NOS W-01–(IM)–1 OF 2009, W-01–2 OF 2009 AND W-01–4 OF 2009
TENGKU BAHARUDIN SHAH, MOHD HISHAMUDIN AND ZAHARAH IBRAHIM JJCA
4 MAY 2011

Civil Procedure — Judicial review — High Court — Leave to apply for judicial review against findings of Royal Commission of Enquiry refused — Test to be applied for grant of leave — Whether appellants had arguable case for grant of leave — Whether findings of Commission were 'decisions' capable of being judicially reviewed — Whether appellants adversely affected by findings of Commission

The Court of Appeal heard together the appeals of the three appellants herein against the High Court's refusal to grant their separate applications for leave to apply for judicial review of the findings of the respondent. The respondent, established on 12 December 2007 to enquire into the video clip recording of images of a person purported to be an advocate and solicitor speaking on the telephone on matters regarding the appointment of judges, conducted public hearings for about a month and submitted its report to the King on 9 May 2008. The report was made available to the public on 20 May 2008. Each of the appellants sought to quash those parts of the report which implicated him on the grounds that the findings which implicated the respective appellant were biased, prejudiced and contrary to principles of law. The appellants said the High Court applied the wrong test to decide whether to grant leave for judicial review ie whether the appellants had shown a prima facie case when the test should have been a lower threshold of whether, prima facie, the leave applications were not frivolous or vexatious and showed some substance and merit in the grounds supporting them. The appeal also dealt with the question whether the respondent's findings were 'decisions' within the meaning of O 53 r 2(4) of the Rules of the High Court 1980 ('RHC') capable of being judicially reviewed and whether the appellants were adversely affected by the respondent's findings. The appellants also argued that even if the findings were not 'decisions', the High Court could still exercise judicial review over them by virtue of s 25(2) of the Courts of Judicature Act 1964 ('CJA')read with para 1 of the Schedule to the CJA.

Held, allowing the appeals:

(1) (per **Mohd Hishamudin JCA, dissenting**) The High Court was correct in refusing the leave application and deciding that the findings of the

respondent were not amenable to judicial review as they were not 'decisions' for the purpose of O 53 r 2(4) of the RHC. The respondent did not make any 'decision', let alone a decision that affected the rights of, or imposed any liabilities on, the appellants. The respondent's role was only to investigate, make findings and, if need be, make recommendations, and ultimately, to submit a report to the King (see para 21).

(2) (per **Mohd Hishamudin JCA, dissenting**) The phrase 'any other purpose' in para 1 of the Schedule to the CJA meant the High Court had power to exercise judicial review over a public authority for the purpose of enforcing a legal right or a legal duty not in the nature of a fundamental right and provided the exercise of such power was restricted only to cases where prerogative writs could, according to well established principles, be issued by the court (see para 39).

(3) (per **Mohd Hishamudin JCA, dissenting**) The High Court was correct in finding there was no inconsistency between O 53 r 2(4) of the RHC and paragraph 1 of the Schedule to the CJA. Nothing in the cases cited by the appellants suggested that O 53 r 2(4) by restricting judicial review to 'decisions' was ultra vires paragraph 1 of the Schedule to the CJA (see para 40).

(4) (per **Zaharah Ibrahim JCA**) All that was required to be determined at the leave application stage was whether prima facie there was substance and merit in the grounds of the application (see para 79).

(5) (per **Zaharah Ibrahim JCA**) In requiring the appellants to show that there was a prima facie case in their favour and that the application was not made vexatiously, the High Court had erred as it placed a higher threshold in the path of the appellants than they were required to cross (see para 53).

(6) (per **Zaharah Ibrahim JCA**) The respondent had determined there was sufficient evidence of misbehaviour on the part of certain individuals, including the appellants, that warranted various laws to be invoked against them. These determinations were based on certain findings. Whether these determinations or findings constituted 'decisions' was an arguable question that should have been permitted to be taken up at the hearing of the substantive motion (see paras 73–74).

(7) (per **Zaharah Ibrahim JCA**) The issue of whether the appellants' rights under art 5 of the Federal Constitution had been adversely affected by the findings of the respondent was a matter which they should have been allowed to argue at the hearing of the substantive motion (see para 80).

[*Editorial Notes*: Tengku Baharudin Shah JCA has concurred with Zaharah Ibrahim JCA's decision in allowing the appeal].

[Bahasa Malaysia summary

Mahkamah Rayuan telah mendengar bersama rayuan-rayuan ketiga-tiga perayu terhadap keengganan Mahkamah Rayuan untuk memberikan permohonan berasingan mereka untuk kebenaran memohon semakan kehakiman bagi penemuan responden-responden. Responden, ditubuhkan pada 12 Disember 2007 untuk menyiasat tentang klip rakaman video bagi imej-imej seorang yang dikatakan peguamcara dan peguambela yang sedang berbual di dalam telefon berkenaan dengan perkara-perkara mengenai pelantikan hakim-hakim, telah mengadakan perbicaraan awam selama sebulan dan telah menyerahkan laporannya kepada Yang di-Pertuan Agong pada 9 Mei 2008. Laporan tersebut adalah tersedia bagi pihak awam pada 20 Mei 2008. Setiap perayu telah memohon untuk membatalkan bahagian laporan yang membabitkannya atas alasan bahawa penemuan-penemuan yang mana membabitkan perayu berkenaan adalah berat sebelah, prejudis dan adalah bercanggah dengan prinsip undang-undang. Perayu-perayu mengatakan Mahkamah Tinggi telah mengguna pakai ujian yang salah dalam memutuskan sama ada kebenaran untuk semakan kehakiman harus diberikan iaitu sama ada perayu-perayu telah menunjukkan kes prima facie sedangkan ujian seharusnya pada standard yang lebih rendah iaitu sama ada, prima facie, permohonan-permohonan kebenaran adalah tidak remeh dan menyusahkan dan menunjukkan isi dan merit di dalam alasan-alasan yang menyokongnya. Rayuan tersebut juga meneliti persoalan sama ada penemuan-penemuan responden adalah 'decision' dalam maksud A 53 k 2(4) Kaedah-Kaedah Mahkamah Tinggi 1980 ('KMT') yang mana boleh disemak secara kehakiman dan sama ada perayu-perayu terjejas oleh penemuan-penemuan responden. Perayu-perayu juga membantah bahawa meskipun penemuan-penemuan tersebut bukanlah 'decision', Mahkamah Tinggi masih boleh melaksanakan semakan kehakiman terhadap mereka menurut s 25(2) Akta Mahkamah Kehakiman 1964 ('AMK') yang dibaca bersama perenggan 1 Jadual kepada AMK.

Diputuskan, membenarkan rayuan-rayuan:

(1) (oleh **Mohd Hishamudin HMR, menentang**) Mahkamah Tinggi adalah betul apabila menolak permohonan kebenaran dan memutuskan bahawa penemuan-penemuan responden adalah tidak tertakluk kepada semakan kehakiman memandangkan ianya bukan 'decision' bagi tujuan A 53 k 2(4) KMT. Responden tidak membuat sebarang 'decision', malahan keputusan yang mana menjejaskan hak-hak, atau mengenakan sebarang liabiliti ke atas perayu-perayu. Peranan responden adalah sekadar menyiasat, membuat penemuan-penemuan dan, jika perlu, membuat cadangan, dan paling utama, menyerahkan laporan kepada Yang di-Pertuan Agong (lihat perenggan 21).

(2) (oleh **Mohd Hishamudin HMR, menentang**) Perkataan 'any other purpose' di dalam perenggan 1 Jadual kepada AMK bermaksud

Mahkamah Tinggi mempunyai kuasa untuk melaksanakan semakan kehakiman terhadap pihak berkuasa awam bagi tujuan untuk menguatkuasakan hak di sisi undang-undang atau tanggungjawab di sisi undang-undang yang bukan bersifat hak asasi dan memperuntukkan bahawa pelaksanaan kuasa tersebut adalah terhad hanya kepada kes-kes di mana writ prerogatif boleh, mengikut prinsip matan keadilan, dikeluarkan oleh mahkamah (lihat perenggan 39).

(3) (oleh **Mohd Hishamudin HMR, menentang**) Mahkamah Tinggi adalah betul dalam penemuan bahawa tiada yang tidak konsisten di antara A 53 r 2(4) KMT dan perenggan 1 Jadual kepada AMK. Tiada apa-apa di dalam kes yang dirujuk oleh perayu-perayu yang menyarankan bahawa A 53 k 2(4) dengan mengehadkan semakan kehakiman kepada 'decision' adalah ultra vires perenggan 1 Jadual kepada AMK (lihat perenggan 40).

(4) (oleh **Zaharah Ibrahim HMR**) Apa yang perlu ditentukan semasa peringkat permohonan kebenaran adalah sama ada prima facie terdapat isi dan merit di dalam alasan-alasan permohonan (lihat perenggan 79).

(5) (oleh **Zaharah Ibrahim HMR**) Dengan memerlukan perayu-perayu untuk menunjukkan sama ada terdapat prima facie kes bagi pihak mereka dan bahawa permohonan yang dibuat tidak menyusahkan, Mahkamah Tinggi telah khilaf dengan meletakkan standard yang lebih tinggi terhadap perayu-perayu berbanding dengan apa yang perlu dilalui oleh mereka (lihat perenggan 53).

(6) (oleh **Zaharah Ibrahim HMR**) Responden telah menentukan bahawa terdapat keterangan salah laku yang mencukupi bagi beberapa individu, termasuk perayu-perayu, yang mana mewajarkan beberapa undang-undang untuk dikenakan terhadap mereka. Penentuan-penentuan tersebut adalah berdasarkan beberapa penemuan. Sama ada penentuan-penentuan atau penemuan-penemuan ini dianggap sebagai 'decision' merupakan persoalan yang boleh dihujahkan di mana ia seharusnya dibuat semasa perbicaraan usul substantif (lihat perenggan 73–74).

(7) (oleh **Zaharah Ibrahim HMR**) Isu sama ada hak perayu-perayu di bawah perkara 5 Perlembagaan Persekutuan telah terjejas oleh penemuan-penemuan responden adalah perkara yang seharusnya dibenarkan untuk dihujah oleh mereka semasa perbicaraan usul substantif (lihat perenggan 80).

[*Nota Editorial*: Tengku Baharudin Shah HMR telah bersetuju dengan keputusan Zaharah Ibrahim HMR dalam membenarkan rayuan].]

Notes

For cases on judicial review generally, see 2(2) Mallal's Digest (4th Ed, 2010 Reissue) paras 4797–4807.

Cases referred to

Application by Ong Eng Guan for an order of prohibition in re appointment of SHD Elias, In re [1959] MLJ 92, HC (folld)

Association of Bank Officers, Peninsular Malaysia v Malayan Commercial Banks Association [1990] 3 MLJ 228; [1990] 1 CLJ 33, SC (folld)

Bandar Utama Development Sdn Bhd & Anor v Lembaga Lebuhraya Malaysia & Anor [1998] 1 MLJ 224, HC (refd)

Chua Ho Ann, Re [1963] MLJ 193 (folld)

Erebus Royal Commission, Re; Air New Zealand Ltd v Mahon (No 2) [1981] 1 NZLR 618, CA (refd)

JP Berthelsen v Director General of Immigration, Malaysia & Ors [1987] 1 MLJ 134, SC (refd)

Minister of Finance, Government of Sabah v Petrojasa Sdn Bhd [2008] 4 MLJ 641, FC (refd)

Mohamed Nordin bin Johan v Attorney-General, Malaysia [1983] 1 MLJ 168, FC (refd)

R Rama Chandran v The Industrial Court of Malaysia & Anor [1997] 1 MLJ 145; [1997] 1 CLJ 147, FC (refd)

Tuan Hj Sarip Hamid & Anor v Patco Malaysia Bhd [1995] 2 MLJ 442, SC (refd)

Tun Dato Haji Mohamed Salleh bin Abas v Tan Sri Dato Abdul Hamid bin Omar & Ors [1988] 3 MLJ 149; [1988] 1 CLJ (Rep) 294, SC (distd)

Legislation referred to

Commissions of Enquiry Act 1950 ss 2, 2(1), 2(1)(d), 3(1)
Constitution of India art 226, 226(1), Part III
Courts of Judicature Act 1964 s 25(2,) Schedule, para 1
Federal Constitution arts 5, 125, Part II
Rules of the High Court 1980 O 53 rr 2(1), (4) 3, 3(1)

Appeal from: Application for Judicial Review No R2–25–192 of 2008 (High Court, Kuala Lumpur)

Mahinder Singh Dulku (Muzaffirah Ahmad Fairuz and Fiji Natasya Jamaluddin Ahmad Fairuz with him) (Firah & Associates) for the first appellant.
Second appellant in person.

Mohd Hishamudin JCA (dissenting):

[1] These three appeals were heard together before this court. I am dismissing these appeals with costs.

[2] At the High Court of Kuala Lumpur (Appellate and Special Powers Division) the three appellants, namely:

(1) Tun Ahmad Fairuz (a former Chief Justice) ('the first appellant');

(2) Dato' Kanagalingam (or Dato' VK Lingam) (an advocate and solicitor) ('the second appellant'); and

(3) Tun Eusoff Chin (a former Chief Justice) ('the third appellant'),

had (by separate applications) applied for leave under O 53 r 3(1) of the Rules of the High Court 1980 ('the RHC') to make an application for judicial review under O 53 r 2(4) of the RHC against the findings of the respondent, a Commission of Enquiry ('the Commission') appointed by His Majesty the Yang di-Pertuan Agong ('His Majesty, the King') pursuant to s 2 of the Commissions of Enquiry Act 1950 ('the Act').

[3] Abdul Kadir Musa J refused the applications; and hence these appeals before this court (Court of Appeal).

[4] The background facts are clearly summarised by the introductory part of the report of the Commission. For the sake of convenience I propose to just repeat them here, and they are as follows.

[5] On 19 September 2007, a video clip recording containing controversial material relating to the judiciary surfaced in the internet. It depicted images of a person engaged in a phone conversation relating to the appointment of judges. The exposure was explosive. It created a chain reaction in the public domain spreading like wild fire across the Malaysian landscape. It became a common topic of conversation and gossip. The judiciary was shaken. The legal fraternity was alarmed. So was the government. Indeed, so was the whole country. Not surprisingly on 25 September 2007, the government decided to establish a panel comprising three members, namely, YB Tan Sri Dato' Seri Haidar bin Mohamed Noor, YB Dato' Mahadev Shankar and YB Tan Sri Dato Seri Lee Lam Thye to verify the authenticity of the video clip recording. Upon conclusion on 9 November 2007, the panel submitted a report to the government recommending that a Commission of Enquiry be set up.

[6] The government took heed of the recommendation of the panel. The Prime Minister, YAB Dato' Seri Abdullah bin Hj Ahmad Badawi, took steps to advise His Majesty the King for the establishment of a Commission of Enquiry.

[7] On 12 December 2007, the Commission was officially constituted by His Majesty, in accordance with the provisions of the Act to enquire into the video clip recording of images of a person purported to be an advocate and solicitor speaking on the telephone on matters regarding the appointment of judges and set out five terms of reference for the consideration of the Commission. Acting under s 2(1)(d) and sub-s 3(1) of the Act, His Majesty directed YB Tan Sri Dato' Seri Haidar bin Mohamed Noor (retired Chief Judge of Malaya) to be the Chairman of the Commission and the other four members of the Commission to comprise YB Tan Sri Datuk Amar Steve Shim Lip Kiong (retired Chief Judge of Sabah and Sarawak), YB Dato' Mahadev Shankar (retired Court of Appeal Judge), YB Puan Sri Datuk Zaitun Zawiyah bt Puteh (former solicitor general) and YB Dato' Dr Khoo Kay Kim (Emeritus Professor of Malaysian History, University of Malaya).

[8] Section 2(1) of the Act provides:

> Issue of Commissions
>
> 2 (1) The Yang di-Pertuan Agong may, where it appears to him to be expedient so to do, issue a Commission appointing one or more Commissioners and authorizing the Commissioners to enquire into —
>
> (a) the conduct of any federal officer;
>
> (b) the conduct or management of any department of the public service of Malaysia;
>
> (c) the conduct or management of any public institution which is not solely maintained by State funds; or
>
> (d) any other matter in which an enquiry would, in the opinion of the Yang di-Pertuan Agong, be for the public welfare, not being —
>
> (i) a matter involving any question relating to the Islamic religion or the Malay custom; or
>
> (ii) in relation to Sabah or Sarawak, a matter specified in item 10 of the State List:
>
> Provided that where any federal officer into whose conduct it is proposed to enquire, was, at the time of committing such conduct, serving in a department of the public service of a State, such commission shall only be issued with the concurrence of the State Authority.

[9] Section 3(1) of the Act provides:

Terms of Commission

3 (1) A Commission issued under section 2 shall specify the subject of the enquiry and may, in the discretion of the Yang di-Pertuan Agong or the State Authority, as the case may be —

(a) if there is more than one Commissioner, direct —

(i) which Commissioner shall be Chairman; and

(ii) the number of Commissioners which shall constitute a quorum;

(b) direct where and when the enquiry shall be held and the report thereof rendered;

(c) direct whether the enquiry or any part thereof shall or shall not be held in public; and

(d) generally prescribe how the Commission shall be executed.

[10] The following are the terms of reference of the Commission:

(a) to enquire and ascertain the authenticity of the video clip;

(b) to enquire and identify the speaker, the person he was speaking to in the video clip and the persons mentioned in the conversation;

(c) to enquire and ascertain the truth or otherwise of the content of the conversation in the video clip;

(d) to determine whether any act of misbehavior has been committed by person or persons identified or mentioned in the video clip; and

(e) to recommend any appropriate course of action to be taken against the person or persons identified or mentioned in the video clip, should such person or persons be found to have committed any misbehaviour.

[11] The enquiry was conducted between 14 January 2008 and 15 February 2008. It was conducted in one of the courtrooms of the Jalan Duta Court Complex.

[12] The three appellants were among those summoned to give evidence before the Commission.

[13] The Commission submitted its report to His Majesty the King on 9 May 2008. Subsequently the report was transmitted to the government who decided to make it available to the public as from 20 May 2008.

[14] It is therefore to be noted that, until 19 May 2008, the public (including the appellants) did not have sight of the report. Until 19 May 2008 the appellants had no knowledge of the findings of the Commission.

[15] The Commission, in their report submitted to His Majesty, presented its executive summary as follow:

> Executive Summary
>
> Having considered all the materials before us, that is, the testimonies, of 21 witnesses, 116 exhibits and 17 statutory declarations including the submissions, we are pleased to summarize our Findings on the five Terms of Reference herein below as follows:
>
> (1) To enquire and ascertain the authenticity of the video clip;
>
> The Commissioners find that the video clip, Ex.C7 is authentic.
>
> (2) To enquire and identify the speaker, the person he was speaking to in the video clip and the persons mentioned in the conversation;
>
> The Commissioners find:
>
> (a) that the person speaking on the phone is Dato' V.K Lingam;
>
> (b) that the person to whom he was speaking on the phone is Tun Ahmad Fairuz bin Dato' Sheikh Abdul Halim;
>
> (c) that the Chinese man he was seen conversing with, after the phone conversation had ended, is Mr. Loh Mui Fah; and
>
> (d) that other persons mentioned in the conversation will be identified in the body of the Report.
>
> 3. To enquire and ascertain the truth or otherwise of the content of the conversation in the video clip;
>
> The Commissioners find the content of the conversation in the video clip is true in substance and in material particulars.
>
> 4. To determine whether any act of misbehaviour has been committed by person or persons identified or mentioned in the video clip;
>
> The Commissioners find sufficient evidence of misbehaviour on the part of certain individuals or personalities identified or mentioned in the video clip. In this connection, we refer to the body of the Report.
>
> 5. To recommend any appropriate course of action to be taken against the person or persons identified or mentioned in the video clip, should such person or persons be found to have committed any misbehaviour.
>
> The Commissioners find sufficient cause to invoke the Sedition Act 1948, the Legal Profession Act 1976, the Official Secrets Act 1972 and the Penal Code against the various individuals mentioned in the video clip which we have elaborated in the Report. We do not discount the possibility of other laws being

> contravened. We leave it to the Attorney General, Malaysia and the Malaysian Bar Council, to take the appropriate actions against the personalities implicated. Additionally, we are proposing to the Government for the necessary reforms including the establishment of a Judicial Appointments Commission.

[16] The three appellants claim that they are aggrieved by the findings of the Commission. They make several allegations against the Commission, and among the allegations are that the Commission was bias, that some of the members of the Commission had refused to rescue themselves when applied to do so, that the Commission had refused to summons certain material witnesses to testify, and that the Commission had exceeded its terms of reference.

[17] Now, O 53 r 2(1) of the RHC provides:

> (1) An application for any of the reliefs specified in paragraph 1 of the Schedule to the Courts of Judicature Act 1964 (other than an application for an order of habeas corpus) shall be in Form 111 A.

[18] Order 53 r 2(4) of the RHC provides:

> (4) Any person who is adversely affected by the decision of any public authority shall be entitled to make the application

[19] Order 53 r 3(1) of the RHC stipulates:

> (1) No application under this Order shall be made unless leave therefore has been granted in accordance with this rule.

[20] In deciding as to whether or not leave ought to be granted, a High Court must be guided by the principle as laid down by the Supreme Court in *Association of Bank Officers, Peninsular Malaysia v Malayan Commercial Banks Association* [1990] 3 MLJ 228; [1990] 1 CLJ 33 where Ajaib Singh SCJ, in delivering the judgment of the Supreme Court, said:

> In his grounds of judgment the learned judicial commissioner had gone further than the leave stage and embarked on substantial issues on merit. We did not think that this was the right approach when the application for leave to apply for an order of certiorari is made. The guiding principles ought to be that the applicants must show prima facie that the application is not frivolous or vexatious and that there is some substance in the grounds supporting the application.

[21] In my judgment, the learned High Court judge was correct in law in refusing leave that was applied for by the appellants pursuant to O 53 r 3(1) of the RHC. In my view, Abdul Kadir Musa J was correct in his decision that the

findings of the Commission of Enquiry are not amenable to judicial review as the findings are not 'decision' for the purpose of O 53 r 2(4) of the RHC. The Commission did not make any decision, let alone making a decision that affects the rights of, or that impose any liabilities on, the appellants. The role of the Commission was only to investigate, to make findings, and, if need be, to make recommendations; and ultimately to submit a report to His Majesty. Until the report was made available to the public, the public (including the appellants) had no access to the report and had no knowledge as to the contents of the same. The government was not bound to act on the findings and recommendations of the Commission; or even to make public the report of the Commission (although, in practice, the government do normally make public the report).

[22] In my judgment, the learned High Court judge's decision is supported by authorities.

[23] In *Tun Dato Haji Mohamed Salleh bin Abas v Tan Sri Dato Abdul Hamid bin Omar & Ors* [1988] 3 MLJ 149; [1988] 1 CLJ (Rep) 294, Hashim Yeop Sani SCJ, in delivering the decision of the Supreme Court, said (at p 151 (MLJ); p 297(CLJ)):

> The functions of the tribunal appointed under art 125(3) of the Constitution is to enquire and investigate on the representation and then report to the Yang di-Pertuan Agong with any recommendation it may make. The tribunal is a body which investigates and does not decide. It is performing a constitutional function. The tribunal should not therefore be restrained from performing its constitutional function.

[24] In *In re application by Ong Eng Guan for an order of prohibition in re appointment of SHD Elias* [1959] MLJ 92 Rose CJ held (at p 94):

> It seems to me that a clear inference is to be drawn from this. Moreover, looking at the matter broadly from the point of view of the public interest, it seems to me that the usefulness of Commissions of Inquiry would be impaired if their proceedings were allowed to be challenged either at the outset or during their continuance by prohibition or at their conclusion by certiorari.
>
> The available remedies against a report which may be regarded as unsatisfactory are twofold. First, the appointing authority, in other words the government of the day, may reject all or any of the recommendations; secondly, an interested party or indeed any member of the public who is aggrieved by the report may initiate criticism in Parliament, State Council or Legislative Assembly as the case may be. In the very rare case — and indeed I do not recollect having heard of any such — of a Commission of Inquiry so misconducting itself as to create a scandal, no doubt the appointing authority has the power to withdraw the authority which it has itself bestowed.

In my opinion, therefore, both public interest and past practice point irresistibly to the conclusion that the correct view is that neither of these two writs, certiorari or prohibition, lie in the case of a Commission of Inquiry.

[25] In *Re Chua Ho Ann* [1963] MLJ 193 Buttrose J said (at p 194):

The committee is a fact finding committee. Its function is to inquire into and investigate the facts and convey information thereon to the Minister. It is not required to make recommendations. It makes no decision on the result of its findings which have no legal or binding force, affect no rights and impose neither liabilities nor obligations

The Minister is only required to have regard to the committee's report in making his order but having done so it is open to him to refrain from acting on any advice tendered in it. It is to the Minister and the Minister alone that the decision to deprive a person of his citizenship is entrusted. The committee of inquiry is merely conducting a factual investigation on behalf of the Minister in an advisory capacity.

The committee's duties are not, in my opinion in any relevant sense judicial or quasi-judicial but purely ministerial. To use a phrase in one of the cases cited in argument the committee is but an adjunct of the executive power.

It was urged upon me that the committee had all the trappings of a judicial body or court in enforcing the attendance of witnesses and examining them upon oath, affirmation or otherwise and in the issue of a commission or a request to examine witnesses abroad and in compelling the production of documents. But these are merely procedural matters design to facilitate the carrying out by the committee of its duties without which its usefulness would be gravely impaired. They are, moreover, matters common to all committees of inquiry including commissions of inquiry under the Inquiry Commissions Ordinance (Cap 52) against whom prohibition has never been held to lie. See *In re application by Ong Eng Guan for an order of prohibition in re appointment of SHD Elias* [1959] MLJ 92.

[26] It is, however, the contention of the appellants that the Commission in carrying out the inquiry had exceeded its terms of reference when it investigated the New Zealand holiday of Tun Eusoff Chin and Dato' VK Lingam. The appellants submit that the findings of the Commission is amenable to judicial review if the Commission had exceeded its terms of reference, citing the New Zealand Case of *Re Erebus Royal Commission; Air New Zealand Ltd v Mahon (No 2)* [1981] 1 NZLR 618. The legal position in New Zealand is stated by the judgment of the New Zealand Court of Appeal (at p 664 of the judgment) in the following manner:

It is established in New Zealand that in appropriate proceedings the courts may prevent a Commission of Inquiry — whether a Royal Commission, a statutory Commission or perhaps a combination of the two — from exceeding its powers by

A going outside the proper scope of inquiry. That basic principle was clearly accepted by this court in *In re Royal Commission on Licensing* [1945] NZLR 665. See especially the judgment of Myers CJ at pp 678–680.

B **[27]** The above may very well be the legal position in New Zealand. But, with respect, I prefer to follow the authorities that I have referred to earlier, in particular, the Supreme Court case of *Tun Salleh Abas*. The rationale for the Malaysian/Singapore legal position was well explained by Rose CJ in *In re application by Ong Eng Guan for an order of prohibition in re appointment of*
C *SHD Elias*, and I have earlier in this judgment already cited the relevant passages of the learned Chief Justice's judgment. In any event, in the present case, the terms of reference of the Commissions are framed in wide terms and I am not persuaded that the Commission had exceeded its powers. One of the terms of reference is:

D

(4) to determine whether any act of misbehaviour has been committed by person or persons identified or mentioned in the video clip.

E **[28]** The appellant Dato' VK Lingam has been identified by the Commission in its findings as the person in the video clip. Tun Eusoff Chin's name was mentioned by Dato' VK Lingam in the video clip. The Commission in its report explains the relevance of the investigation into the New Zealand holiday as follows:

F

After hearing submissions, the Commission took the view that matters relating to the New Zealand trip were relevant to establish the degree of relationship between DVKL and Tun Eusoff Chin which had a direct bearing on certain parts of the conversation shown in the video clip. It was also relevant to the issue of credibility. As a result, the Commission allowed Mr. Robert Lazar to continue with his
G questions on the New Zealand trip.

[29] It is also the argument of the appellants that even if the findings of the Commission are not 'decision' for the purpose of O 53 r 2(4) of the RHC,
H nevertheless, the High Court still has the jurisdiction to exercise judicial review over those findings by virtue of s 25(2) of the Courts of Judicature Act 1964 ('the CJA') read together with para 1 of the Schedule to the CJA. Section 25(2) of the CJA reads:

I

(2) Without prejudice to the generality of subsection (1) the High Court shall have the additional powers set out in the Schedule:

Provided that all such powers shall be exercised in accordance with a written law or rules of court relating to the same.

[30] Paragraph 1 of the Schedule to the CJA reads:

(1) Prerogative writs

Power to issue to any person or authority directions, orders or writs, including writs of the nature of habeas corpus, mandamus, prohibition, quo warranto and certiorari, or any orders, for the enforcement of the rights conferred by Part II of the Constitution, or any of them, or for any purpose.

[31] For their proposition, the appellants rely on the words 'for any purpose' appearing at the end of the above paragraph. It is the contention of the appellants that Order 53 r 2(4) of the RHC can neither determine nor limit the proper interpretation to be given to the words 'for any purpose'. It is further argued by the appellants that the phrase 'for any purpose' must be given a wide and liberal interpretation so as to empower the High Court to review a finding by the Commission.

[32] With respect, I am unable to accept such a proposition.

[33] I accept the submission of Puan Azizah Nawawi, the learned senior federal counsel appearing for the respondent, that the words 'or any of them' in para 1 of the Schedule to the CJA must be interpreted to mean any of the fundamental rights conferred by Part II of the Constitution.

[34] But, then, what is more pertinent is the proper interpretation to be given to the phrase 'for any purpose' found in para 1 of the Schedule? It is the contention of the appellants that the phrase must be given a wide and liberal interpretation. Citing *Minister of Finance, Government of Sabah v Petrojasa Sdn Bhd* [2008] 4 MLJ 641 and *R Rama Chandran v The Industrial Court of Malaysia & Anor* [1997] 1 MLJ 145 they submit that (see subparas (3) and (4) of para 174 of Dato' VK Lingam's outline submission):

(3) The words 'or for any purpose' appearing in paragraph 1 of the Schedule of the CJA are even wider and makes dear the wide area in which the remedies are to operate. This reflects the conferment of a wide power upon the High Court in the matter of public remedies;

(4) Parliament had intended that the High Court should be empowered to grant relief which is ordinarily beyond the scope of the usual public law remedies;

[35] With respect, I must disagree with the interpretation as proposed by the appellants.

[36] Now, para 1 of the Schedule to the CJA is in pari materia with art 226(1) of the Constitution of India. That article states:

> Notwithstanding anything in article 32, every High Court shall have the power, throughout the territories in relation to which it exercises jurisdiction, to issue to any person or authority, including in appropriate cases any government, within those territories, order or writs, including writs in the nature of habeas corpus, mandamus, prohibition, quo warranto and certiorari, or any of them, for the enforcement of any of the rights conferred by part III and for any other purpose.

[37] Part III of the Indian Constitution corresponds to Part II of our Federal Constitution which provides for fundamental liberties.

[38] Puan Azizah refers to *Shorter Constitution of India*, (8th Ed) by Durga Das Basu (pp 412–413) that states:

> Purposes for which the power under Art. 226 may be exercised. — 1. The power of the High Court to issue the writs under Art. 226 can be exercised for twofold purpose, viz., the enforcement of (a) fundamental rights, as well as of (b) non-fundamental or ordinary legal rights.
>
> (2) The words 'for any other purpose' at the end of Art. 226 make the jurisdiction of the High Court to issue the writs more extensive than that of the Supreme Court inasmuch as these words are absent from Art. 32, and the Supreme Court may have power for 'other purpose' only if such power is conferred by legislation (Art. 139). But Art. 226 itself confers upon the High Court power to issue the writs for the enforcement of Fundamental Rights as well as for 'other purpose'.
>
> (3) 'Any other purpose' means a purpose for which any of the writs could, according to well-established principles, issue. The result is that while under the first part, a writ may be issued under the Article only after a decision that the aggrieved party has a fundamental right and that it has been infringed under the second part, it may be issued only after a finding that the aggrieved party has a legal right which entitles him to any of the aforesaid writs and that such right has been infringed. Any other purpose', in short, means 'the enforcement of any legal right and the performance of any legal duty'. A legal right, of course, means any legally enforceable right, and includes contractual rights, other than merely personal rights.

[39] With respect, I am minded to adopt the interpretation as explained above by *Basu's Shorter Constitution of India*, that is to say, the interpretation that the phrase 'any other purpose' in para 1 of the Schedule to the CJA means that the High Court is empowered to exercise judicial review over a public authority for the purpose of enforcing a legal right or a legal duty which are not in the nature of a fundamental right, provided that the exercise of such power of judicial review is restricted only to cases where the prerogative writs could, according to well established principles, be issued by the High Court.

[40] The appellants in their argument seem to imply that O 53 r 2(4) of the RHC, by restricting judicial review only to 'decisions', is ultra vires the CJA.

But there is nothing in the two cases cited by the appellants to suggest that O 53 r 2(4) is ultra vires para 1 of the Schedule to the CJA. In my judgment, the learned High Court judge was correct in his finding that there is no inconsistency between O 53 r 2(4) of the RHC and para 1 of the Schedule to the CJA. And the relevant passages from *Basu's Shorter Constitution of India* that I have referred to above do not in any way suggest that the word 'decision' in O 53 r 2(4) runs foul of para 1 of the Schedule to the CJA.

Zaharah Ibrahim JCA:

INTRODUCTION

[41] The three appeals were heard together by this court. The main submissions were delivered by the appellant in Appeal No W-01–02 of 2009 (Dato' Kanagalingam) who appeared in person, to whose submissions were added those of Dato' Mahinder Singh Dulku, counsel for the appellant in Appeal No W-01–(IM)–01 of 2009. Dato' Hazman Ahmad for the appellant in Appeal No W-01–04- of 2009 adopted their submissions.

[42] The three appeals are appeals against the decision of the learned High Court judge refusing to grant leave under O 53 r 3 of the Rules of the High Court 1980 ('RHC') for the judicial review of the findings of the Royal Commission of enquiry of the video clip recording of images of a person purported to be an advocate and solicitor speaking on the telephone on matters regarding the appointment of judges dated 9 May 2008 ('the Royal Commission').

[43] The enquiry was conducted by way of public hearings which ended on 15 February 2008. A report was submitted to the Yang di-Pertuan Agong on 9 May 2008 and that report was made available to the public on 20 May 2008.

[44] Each of the appellants sought to quash those parts of the Royal Commission's report which implicates him, and the grounds advanced were that those findings which implicated the respective appellant are tainted due to bias, and prejudice and that those findings were contrary to principles of law.

[45] Before the High Court, the applications for leave by the appellants were met by preliminary objections by the senior federal counsel, Datin Azizah Nawawi ('SFC'), who appeared on behalf of the attorney general. From the record of appeal, it appears that the main objection taken by the attorney general was that the Royal Commission's 'findings' are not 'decisions' so as to be capable of being judicially reviewed.

[46] As arguments were mainly by the appellant in Appeal No, W-01–02 of 2009, references in these grounds to the memorandum of appeal and the record of appeal are references to that Appeal No W-01–02 of 2009.

[47] The memorandum of appeal sets out several grounds. However, in my judgment, only the following grounds needed to be considered for the purpose of these appeals, namely that:

(a) the learned High Court judge had erred in holding that for the grant for leave for judicial review it is settled law that the applicant must show whether there is a prima facie case for the applicants when the real test is the low threshold of whether prima facie the application is not frivolous or vexatious;

(b) the learned High Court judge erred when he failed to determine that the appellants had shown, prima facie, that their applications were not frivolous or vexatious and that there are substance and merit in the grounds supporting the applications which could only be dealt with and determined at the hearing of the substantive motion.

THE TEST FOR THE GRANT OF LEAVE

[48] From the grounds of decision at p 18 of the appeal record, it appears that the test applied by the learned High Court judge in determining whether or not to grant the leave application was 'whether or not there is a prima facie case in favour of the applicants *and* such applications are *not* made vexatiously'.

[49] The appellants and the SFC in their submissions before this court submitted the Supreme Court decision in *Association of Bank Officers, Peninsular Malaysia v Malayan Commercial Banks Association* [1990] 3 MLJ 228 as authority for the following test for the grant of leave, and that is:

> ... the applicants must show prima facie that the application is not frivojous or vexatious and that there is some substance in the grounds supporting the application

[50] The appellants further referred us to the following cases:

(a) *Bandar Utama Development Sdn Bhd & Anor v Lembaga Lebuhraya Malaysia & Anor* [1998] 1 MLJ 224;

(b) *Mohamed Nordin bin Johan v Attorney-General, Malaysia* [1983] 1 MLJ 168;

(c) *JP Berthelsen v Director General of Immigration, Malaysia & Ors* [1987] 1 MLJ 134,

all of which show that the threshold for the grant of leave is a low threshold.

[51] The SFC also referred us to the Federal Court decision in the case of *Tuan Hj Sarip Hamid & Anor v Patco Malaysia Bhd* [1995] 2 MLJ 442 which held that a judge should grant leave if it is clear that there is a point for further investigation on a full inter partes basis, but if the judge is satisfied that there is no arguable case he should dismiss the application. In other words, the test is whether there is an *arguable case*.

[52] In my view, there is a vast difference between determining whether 'there is a prima facie case in favour of the applicants *and* such applications are not made vexatiously', which was the test used by the learned High Court judge, and determining whether prima facie there is an arguable case (as opposed to a *good* arguable case), or whether the application was neither frivolous nor vexatious and justifies further argument on a substantive motion.

[53] In requiring the appellants to show that there is a prima facie case in their favour *and* that the application was not made vexatiously, learned High Court judge had placed a higher threshold in the path of the applicants than they were required to cross based on the authorities of the courts cited by both sides. In doing so the learned High Court judge had clearly erred.

WHETHER THE APPLICANTS' APPLICATIONS WERE FRIVOLOUS OR VEXATIOUS AND WHETHER THEY HAD AN ARGUABLE CASE

[54] Order 53 r 2(4) of the RHC permits a person who is *adversely affected* by the *decision* of a *public authority* to make an application for the judicial review of that decision.

[55] Before dealing with the provisions of r 2(4), it is useful to note that the learned High Court judge in his grounds of judgment said:

> Section 25(2) of the 1964 Act gives the High Court *additional powers* set out in the Schedule, *in addition* to those general powers under art 121 of the Federal Constitution ('the Constitution'). However, by the proviso to the said s 25(2), it provides that, '... all such powers shall be exercised in accordance with any written or rules of court relating to the same'. The 'rules of court' mentioned thereto in relation to all the present five applications *must* therefore be 'O 53 r 3 and r 2(4)' of the 1980 Rules. Thus *no* such power specified in para 1 can be exercised *by* court as its 'additional power' in contravention of the aforesaid rules of *O 53*. [sic]

[56] Subsection 25(2)of the CJA is as follows:

> (2) Without prejudice to the generality of subsection (1) the High Court shall have the additional powers set out in the Schedule:

A Provided that all such powers shall be exercised in accordance with any written law or rules of court relating to the same.

B **[57]** The learned High Court judge held that the proviso to sub-s 25(2) of the CJA (read with the Schedule to the CJA) prevails over the RHC. This is contrary to what was held by the Federal Court in the case of *Minister of Finance, Government of Sabah v Petrojasa Sdn Bhd* [2008] 4 MLJ 641, ('the *Petrojasa* case'), and in the earlier Federal Court case of *R Rama Chandran v The Industrial Court of Malaysia & Anor* [1997] 1 MLJ 145; [1997] 1 CLJ 147. In
C both cases the Federal Court held that the powers in the CJA cannot be curtailed by the provisions of the RHC.

[58] In the *Petrojasa* case His Lordship Abdul Hamid Mohamad CJ, states,
D inter alia, that 'The proviso to s 25(2) uses the words 'in accordance with any written law or rules of court relating to the issue'. I am of the view that the use of the word 'in accordance' and not 'subject to' merely refers to the procedural aspects.'

E **[59]** Be that as it may, the applications for leave were examined to determine they were frivolous or vexatious and whether the appellants had an arguable case. For that purpose, O 53 r 2(4) was used as a procedural guide.

IS THE ROYAL COMMISSION A PUBLIC AUTHORITY?

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[60] The notes of proceedings in the record of appeal show that the learned High Court judge had noted that SFC had conceded that the Royal Commission is a public authority.

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[61] Not much submission was made on this issue. Therefore, it appears that there was no dispute that the Royal Commission is a public authority.

[62] It must also be noted that it was not shown before this court (or in the
H court below) that there is any statutory or other legal impediment to a judicial review application being made against a *committee of inquiry* such as the Royal Commission.

[63] The SFC referred this court to the case of *Tun Dato Haji Mohamed*
I *Salleh bin Abas v Tan Sri Dato Abdul Hamid bin Omar & Ors* [1988] 3 MLJ 149; [1988] 1 CLJ (Rep) 294 to support her contention that the Royal Commission, just like the tribunal under art 125 of the Federal Constitution, merely investigates and makes a report with recommendations to the Yang di-Pertuan Agong. It does not decide.

[64] It must however be noted that the case of *Tun Dato Haji Mohamed Salleh bin Abas* dealt with a different set of facts. In that case, what was sought was an order of prohibition to restrain the tribunal from submitting their report to the Yang di-Pertuan Agong. That is not the case before this court.

[65] In the instant case, the report of the Royal Commission was already submitted and was in fact published. It is therefore my respectful view that the case of *Tun Dato Haji Mohamed Salleh bin Abas* can be distinguished from the instant case.

[66] The main thrust of the arguments was in relation to the issue of whether what the appellants sought to have judicially reviewed were 'decisions' of the Royal Commission.

DID THE ROYAL COMMISSION MAKE 'DECISIONS'?

[67] The SFC submitted that as the Royal Commission merely made findings and not decisions, those findings cannot be the subject of a judicial review.

[68] For the appellants it was argued that Royal Commission's findings did amount to 'decisions' and therefore can be the subject of judicial review.

[69] The Royal Commission was established pursuant to the public disclosure of a video clip said to contain images of a person, believed to be an advocate and solicitor, discussing on the telephone matters relating to the appointment of judges. The Royal Commission had the following terms of reference:

(1) to enquire and ascertain the authenticity of the video clip;

(2) to enquire and identify the speaker, the person he was speaking to in the video clip and the persons mentioned in the conversation;

(3) to enquire and ascertain the truth or otherwise of the content of the conversation in the video clip;

(4) to determine whether any act of misbehaviour has been committed by person or persons identified or mentioned in the video clip; and

(5) to recommend any appropriate course of action to be taken against the person or persons identified or mentioned in the video clip; should such person or persons be found to have committed any misbehaviour.

[70] The Royal Commission in relation to its fourth term of reference made the following finding (as shown in its executive summary):

> The Commissioners find sufficient evidence of misbehaviour on the part of certain individuals or personalities identified or mentioned in the video clip. In this connection we refer to the body of the Report.

[71] In relation to its fifth term of reference, the Royal Commission made the following finding (also as shown in its executive summary):

> The Commissioners find sufficient cause to invoke the Sedition Act 1948, the Legal Profession Act 1976, the Official Secrets Act 1972 and the Penal Code against the various individuals mentioned in the video clip which we have elaborated in the Report. We do not discount the possibility of other laws being contravened.

[72] From the report of the Royal Commission, it appears that having made their inquiries and determined that certain facts existed, the Royal Commission drew certain conclusions based on those facts, and those conclusions are their determinations for the purpose of the fourth and fifth terms of reference.

[73] The Royal Commission had determined, based on their findings under the first three terms of reference, that there was sufficient evidence of misbehaviour on the part of certain individuals, which included the three appellants herein, that warrant the various laws to be invoked against them.

[74] Whether these determinations, even if not their findings under the first three terms of reference, constitute 'decisions' is certainly arguable and should be permitted to be taken up at the hearing of the substantive motion.

ARE THE APPELLANTS PERSONS WHO ARE 'ADVERSELY AFFECTED'

[75] The learned High Court judge made a finding that even though it could not be denied that the appellants were adversely affected 'in its natural sense' by the findings of the Royal Commission, they were nonetheless not so adversely affected in the context of O 53 r 2(4)of the RHC.

[76] The power in the Schedule to the CJA that the applicants sought to be exercised by the court is the power contained in para 1 of that Schedule which reads as follows:

> (1) Power to issue to any person or authority directions, orders or writs, including writs of the nature of habeas corpus, mandamus, prohibition, quo warranto and certiorari, or any others, for the enforcement of the rights conferred by Part II of the Constitution, or any of them, or for any purpose.

[77] It was argued by the SFC that 'for any purpose' must mean ordinary legal rights other than the fundamental rights in Part II of the Federal Constitution. Support for this was the commentary on art 226 of the Indian Constitution in *Basu's Shorter Constitution of India*.

[78] In this case, the appellants claimed, among others, that as a result of the findings they would be exposed to criminal prosecution. Even if no criminal proceedings are brought against them, the findings had caused a permanent stain and stigma on their character. It was submitted for the appellants that the right they sought to enforce was their right to life in art 5 of the Federal Constitution.

[79] All that is required to be determined *at the leave application stage* is whether prima facie there is substance and merit in the grounds of the appellants' application.

[80] In my judgment, given the terms of the findings of the Royal Commission, the issue of whether the appellants' right under art 5 had been adversely affected by the findings of the Royal Commission is certainly a matter which they should be allowed to argue at the hearing of the substantive motion.

OTHER ISSUES

[81] The appellants had raised in their arguments issues dealing with the conduct of the Royal Commission's inquiry, particularly issues of bias and excess of jurisdiction. In my judgment, these are not issues to be dealt with at the leave application stage, which is just the preliminary stage, but later during the substantive stage after leave is granted.

CONCLUSION

[82] Based on the considerations discussed above, the appeals were allowed and leave was granted to all the appellants.

Appeals allowed.

Reported by Ashok Kumar